88-1433

No. _____

Supreme Court, U.S.
F I L E D
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CHARLIE JOE VAUGHN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLIE JOE VAUGHN
05151-021 E/U
PMB 1000
Tallahassee, Florida
32301
PRO SE PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals rendered a decision in conflict with decisions of this Court and other Courts of Appeal by misapplying the Blockberger rule to the same statutory offense so as to find that the five consecutive sentences on each count of possession with intent to distribute did not constitute double jeopardy.

II. Whether the Court of Appeals rendered a decision in conflict with due process by finding that Petitioner had failed to meet his burden of proving he had continuously possessed only one quantity of cocaine and of proving that each count charged an amount that was charged in a different count.

THE PARTIES

The Petitioner is Charlie Joe Vaughn, the named defendant in the United States District Court for the Southern District of Georgia and the appellant in the Eleventh Circuit Court of Appeals. Petitioner is proceeding pro se in this application. The respondent is the United States of America, represented by the U.S. Attorney for the Southern District of Georgia Hinton R. Pierce and Assistant U.S. Attorney J. Michael Faulkner.

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 859 F.2d 863 (11th Cir. 1988). The order of the United States District Court for the Southern District of Georgia is not reported. Both opinions are reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 4, 1988. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Eighth Amendments to the Constitution of the United States, which are set forth in the Appendix.

The statutory provision involved is 21 U.S.C. §841 which is also set forth in the Appendix.

STATEMENT OF THE CASE

A. Summary of Pertinent Facts

In 1983, Petitioner was contacted by a long-time friend and subsequently made arrangements to sell cocaine to that individual's brother, who, unbeknownst to Petitioner, was cooperating with law enforcement. Five transactions ensued: one-quarter ounce (about 7 grams) of cocaine on March 9, 1983; an additional quarter ounce on March 23, 1983; a half ounce on April 7, 1983; and a quarter ounce on April 27, 1983. Petitioner was arrested on May 2, 1983 during the fifth transaction. The balance of his supply of cocaine, some two and three-quarters ounces, was found in a search of his car at that time. A search of his mobile home and grounds following the arrest

disclosed that Petitioner also possessed a quantity of quaaludes. The searches established that he possessed no scales, documents, or other evidence to suggest a larger scale criminal activity nor any prior drug involvement.

Petitioner was named in a six-count indictment, five counts of possession of cocaine with intent to distribute and one count of possession of methaqualone with intent to distribute, all in violation of 21 U.S.C. §841(a)(1). Petitioner was tried by jury and convicted on all six counts.

Petitioner was sentenced to serve five years in prison plus three years special parole plus $10,000 fine on each of Counts One through Five, to run consecutive to each other. Petitioner was also sentenced to five years probation and a $5,000 fine on Count Six, to

run consecutive to Counts One through Five. Petitioner's total sentence was 25 years incarceration, 15 years special parole, 5 years probation, and $55,000 fine.

Petitioner's conviction was affirmed by the Eleventh Circuit Court of Appeals on direct appeal. United States v. Vaughn, 736 F.2d 665 (11th Cir. 1984).

On March 23, 1987, Petitioner filed a pro se motion for correction of illegal sentence, challenging the five consecutive sentences for possession of cocaine pursuant to Rule 35(a), F.R.Cr.Pro. On August 13, 1987, the District Court summarily denied the Rule 35 motion. Petitioner filed a timely Notice of Appeal to the Eleventh Circuit, which affirmed the District Court's order United States v. Vaughn, 859 F.2d 863 (11th Cir. 1988).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS BY MISAPPLYING THE BLOCKBERGER RULE TO THE SAME STATUTORY OFFENSE SO AS TO FIND THAT THE FIVE CONSECUTIVE SENTENCES ON EACH COUNT OF POSSESSION WITH INTENT TO DISTRIBUTE DID NOT CONSTITUTE DOUBLE JEOPARDY.

The instant petition presents an important question regarding the interpretation and application of the Blockberger rule to sentencing for violations of a single statutory provision and the propriety of consecutive sentences for acts within a course of continuing criminal conduct.

The Eleventh Circuit opinion in Petitioner's case is in conflict with prior decisions of at least two circuits, the Sixth and Tenth. In addition, the Eleventh Circuit's decision implicitly rejects the earlier decision of this

Court upon which the Sixth Circuit relied in an analogous situation. This question has been decided in the context cases involving possession of drugs by several of the circuit courts of appeals in conflicting fashion. That conflict has not yet been addressed by this Court.

Multiple punishments have been considered in this Court in three different circumstances: cases involving distinctly different statutory provisions; cases involving overlapping or similar provisions; and cases involving the same statutory provision.

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) established the rule for construing "distinct statutory provisions." The test in such cases, commonly called "The Blockberger rule" or "the same facts test" was spelled out as follows:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304.

Counts One through Five of the indictment each charged that Petitioner possessed with intent to distribute "a quantity of cocaine" in violation of 21 USC §841(a)(1). Thus, there is no question that the five counts charged him with five violations of the same statutory provision, and Blockberger is not controlling where but a single statutory provision is involved in each of the five counts.

In deciding Petitioner's case, United States v. Vaughn, 859 F.2d 863 (11th Cir. 1988) and at least two other

recent drug possession cases, United States v. Maldonado, 849 F.2d 522 (11th Cir. 1988), and United States v. Fiallo-Jacome, 784 F.2d 1064 (11th Cir. 1986), the Eleventh Circuit has applied the following reading of Blockberger:

> Whether multiple charges constitute one offense turns on whether each charge requires proof of an additional fact which the other does not.

Vaughn, at 859 F.2d 864 (emphasis added).

In rejecting application of the Blockberger rationale to possessory offenses, the Sixth Circuit, on the other hand, has interpreted Blockberger in United States v. Jones, 533 F.2d 1387 (6th Cir. 1976), a gun possession case, United States v. Woods, 568 F.2d 509 (6th Cir. 1978), a drug possession case, and in United States v. Reed, 647 F.2d 678 (6th Cir. 1981), a stolen property case, in this manner:

> The correct statement of the same facts test is found in Blockberger v. United States, 284 U.S. 299, 59 S.Ct. 180, 76 L.Ed. 306 (1932), which held that an offense can be punished separately under two statutes if one statute required proof of a fact which the other does not.

Jones, at 533 F.2d 1391-92.

The Tenth Circuit takes the same position on possession of drugs. In United States v. Mathis, 673 F.2d 289 (10th Cir. 1982), the Court complimented the jury for refusing to return verdicts of guilty on the multiplicious counts, stating:

> The Woods case and our case are similar in that both deal with a single course of criminal conduct and an effort to compound sentences. Thus, if here there had been conviction on Counts I, II, and IV, some of those repetitious convictions would now have to be vacated due to failure of the trial court to recognize that this was one criminal transaction which could not be treated as several distinct criminal transactions.

Mathis, at 673 F.2d 295.

What is actually involved is a question of a violation of a single statute at different points in time. In the case of In re Snow, 120 U.S. 274, 7 S.Ct. 556 (1887), this Court held that only one indictment and conviction of the crime of unlawful cohabitation, under the Act of 1882, could be had for the time preceding the finding of the indictment, because the crime was a continuous one, and was but a single crime until prosecuted. The crime of cohabitation was charged against Snow in three indictments, the crimes being contiguous with each other, one during the year 1883, one during 1884, and one during 1885. Mr. Justice Blatchford, delivering the opinion of the Court, said:

> The offense of cohabitation . . . is inherently a continuous offense, having duration; and not an offense consisting of an isolated act. . . There was but a single offense commited prior to the time the indictments

> were found . . . On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half, and fines amounting to $10,500, or even an indictment covering every week . . . It is to prevent such an application of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purpose of indictment or prosecution, prior to the time the prosecution is instituted.

In United States v. Jones, 533 F.2d 1387 (1976), the Sixth Circuit, finding the Snow reasoning to be persuasive, emphasized the potential for abuse in allowing multiple punishments for the component acts within a course of conduct:

> With equal propriety the Government might have charged Jones with possession on more than 1100 separate days and obtained convictions to imprison Jones for the rest of his life.

Jones, at 533 F.2d 1391.

The Ninth Circuit, in United States v. Palafox, 764 F.2d 558 (9th Cir. 1985), a drug possession and distribution case, addressed this potential for multiple sentence abuse a little differently:

> Permitting separate punishments in the present case could lead to potentially ludicrous results. Government agents, for example, could ask for repeated samples and turn one intended delivery into a theoretically infinite number of crimes, each punishable with a maximum of fifteen years. Such results were not intended under a statute criminalizing the various steps involved in one criminal undertaking.

That is precisely the situation presented in this Petition. Here the ludicrous results are actuality, not merely potential, with Petitioner being sentenced five times for the continuous possession of the same quantity of cocaine. The instant case provides this Court with the proper vehicle for

addressing the potential for sentencing abuse alluded to by the various courts for the past hundred years.

On appeal Petitioner presented legal argument grounded in precedent, both binding and non-binding, dating back as far as King's Bench 1777, with emphasis on United States v. Fiallo-Jacome, 784 F.2d 1064 (11th Cir. 1986), a cocaine possession case involving about a three month time span where the Eleventh Circuit had found but one possession and remanded for sentence correction. In affirming the instant case, the appellate court rejected not only the Sixth Circuit finding in United States v. Woods, 568 F.2d 509 (6th Cir. 1976), and the analogous Supreme Court decision upon which the Sixth Circuit based its finding, but also its own prior finding in Fiallo-Jacome, supra.

In reaching this result, the

Eleventh Circuit failed to address the intent of Congress, the legislative history of 21 U.S.C. §841(a)(1) and its statutory construction, the proper unit of prosecution, and even the definition of and the elements of possession with intent. Relying on application of Blockberger v. United States, supra, and United States v. Maldonado, 849 F.2d 522 (11th Cir. 1988), a drug possession case not involving a course of conduct, the Court of Appeals cited the forensic report of varying purities of cocaine possessed by Vaughn and shifted to him the burden of proving the legal question of multiplicious sentences, despite the fact that the only testimony on this point was provided by the Government's own witness and proved that Petitioner possessed three different purities of the same cocaine (signified by different colors of rubber bands) at the same time,

not that there were three different sources of cocaine. In United States v. Oropeza, 564 F.2d 316 (6th Cir. 1977), the Court addressed the question of legislative intent:

> We find that Congress enacted the possession with intent to distribute provision of 841(a)(1) to punish those who intended to distribute a controlled substance even though the distribution did not come to fruitation, rather than to punish twice a distributor who necessarily possessed before distribution.

Oropeza, at 564 F.2d 324. See also, United States v. Jones, 533 F.2d 1387, 1391:

> Possession is a course of conduct, not an act; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest. If Congress had wished to punish each act of dominion, it could have done so easily by forbidding the acts of dominion instead of the course of conduct.

In Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed. 2d 205 (1980), this Court stated:

> This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such interpretation can be based on no more than a guess as to what Congress intended. Whalen v. U.S., 445 U.S. 684, 695, note 10 (1980); Simpson v. U.S., 98 S.Ct. 909 (1978).

The statute here involved, 21 U.S.C. §841, itself offers no englightment on the intent of Congress. See generally, United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952), a course of conduct case.

In defining "corporeal possession", Black's Law Dictionary, Fifth Edition, states: "The continuing exercise of a claim to the exclusive use of a material thing." While Black's sheds little light

on either "possession" or "possession with intent", it does say of "intent": "Intent is a state of mind, not an act." The Sixth Circuit in United States v. Jones, 533 F.2d at 1387, 1391, stated that possession is a course of conduct, not an act, for the purpose of determining whether multiple punishments may be imposed for possession at various times and cited this Court's ruling in Snow, supra. In defining "continuous", Black's states: "Uninterrupted, unbroken, not intermittent or occasional; so persistently repeated at short intervals as to constitute virtually an unbroken series. Connected, extended or prolonged without cessation or interruption of sequence." Of "continuing offense", Black's states:

> Type of offense which is committed over a span of time, as for example, conspiracy. . . A continuing offense. . . is one which may consist of separate acts or a course of conduct but which

> arises from that singleness of thought, purpose or action which may be deemed a single impulse.

Wharton's Criminal Law (11th Ed. #34) states:

> When the impulse is single, but one indictment lies, no matter how long the action may continue.

Adding at note 3:

> The question is whether the individual acts are prohibited or the course of action which they constitute. If the former, then each act is punishable separately. If the latter, there can be but one penalty.

The Government argues that Petitioner Vaughn is guilty of five separate possessions of cocaine, while Petitioner contends that the evidence showed but one possession of cocaine existed during the time span covered by the indictment. It is impossible, however, to resolve the question without establishing just what the unit of prosecution is, an issue never yet

addressed by either the Government or the Court below. In affirming the District Court's finding, the Eleventh Circuit, without stating what unit of prosecution it was applying, stated:

> A forensic chemist testified as to the quality of cocaine received on certain dates: March 9-87.5% cocaine; March 23-68.8% cocaine; April 7-62% cocaine; May 2, consisting of three samples-40.4%, 50.1% and 50.4% cocaine respectively. The chemist was not asked to determine the purity of the cocaine purchased on April 27th.

Vaughn, 859 F.2d at 865. As stated before, this ignores the testimony of the Government's own witness regarding Petitioner's possession of varying marked qualities of the same cocaine on the same day (May 2, 1983). This presents a unit of prosecution problem paralleling that faced by this Court in United States v. Universal C.I.T. Credit Corp., 344 U.S.

218, 73 S.Ct. 227, 97 L.Ed. 260 (1952). What unit of prosecution was applied in affirming the five consecutive sentences? It could not have been a "sample" or a "quantity" becaue three different packages (all of varying purity) were included in the one count relating to May 2, 1983. It could not have been proved by evidence of a different quality, because no quality was introduced at all to support the April 27th charge. It could not have been a distribution because the May 2 charge was based on evidence seized during a search, while the evidence on the other dates came from distributions to the Government agents. In short, there is no common denominator that could be construed as the unit of prosecution. Therefore, the five consecutive sentences constitute an illegal subdivision of the one crimine of possessing with intent to distribute for

the purpose of enhancement beyond the limit set by Congress. And, the sentence here is 25 years, while the limit set by Congress at the time of this sentencing was 15 years.

In Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 180, 76 L.Ed. 306 (1922), this Court stated:

> Where consecutive sentences are imposed at a single criminal trial, 'the Double Jeopardy Clause prevents the sentencing court from exceeding its legislative authorization by imposing multiple punishments for the same offense.'

Brown, at 432 U.S. 165.

In Sanabria v. United States, 437 U.S. 54. 98 S.Ct. 2170, 57 L.Ed. 43 (1978), this Court stated:

> The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations can be avoided by the simple expedient of dividing a single crime into a series of temporal or spatial units.

In affirming multiple convictions, in Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 21 L.Ed.2d 1405 (1958), a case involving charges under distinctly different statutes, this Court distinguished cases involving a single statute in this fashion:

> It is one thing for a single transaction to include several units (of prosecution) under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times. . .

Commenting on that Gore finding, the Sixth Circuit, in United States v. Woods, 568 F.2d 509 (6th Cir. 1978) stated:

> Here we are not concerned with whether a single act violates a multiplicity of statutes as in Gore and Blockberger. Rather, we face what the Supreme Court has recognized to be a different issue: whether a course of conduct-here, possession (of narcotics) with intent to distribute-can result in

> multiple violations of the same statute. . . Our Court has held that the 'same facts' test in Blockberger is inapplicable to offenses charging a course of conduct, at least where Congress has not indicted the appropriate unit of prosecution.

Gore, at 568 F.2d. In rejecting Blockberger in the same decision, the Sixth Circuit stated:

> We find the test [Blockberger] inappropriate for an offense involving a course of conduct. . . A course of conduct involves a number of acts. To hold that proof of a different act under a separate count establishes a separate offense would destroy the principle that a course of conduct is punishable as only one offense.

Jones, at 533 F.2d 1392.

This Court has applied the rule of lenity in numerous cases to resolve doubts with respect to what Congress intended to be the "unit of prosecution" in situations like this where a statute or a portion thereof proscribed

designated conduct and the question was whether the defendant's conduct constituted more than one violation of the proscription. See, in this respect, United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952); Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); Ladner v. United States, 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed. 199 (1958); and Milanovich v. United States, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961). In Milanovich, the principle of lenity was applied to bring together incidents that were separated in time, place, and method of accomplishment. There this Court found that Mrs. Milanvoch could not be convicted of both the robbery and receiving 17 days later part of the stolen money. In so deciding, this Court stated it was a question of statutory

construction.

Countless Americans are receiving multiple sentences for possessory charges by Courts operating in a judicial "grey area", an area where there is simply no adequate precendential guidance to clarify the intent of Congress. Unless this Court decides to consider this petition, sentencing may continue on a hit-and-miss basis at the whim of the district court, or, even worse, being decided on the accident of geography. Equal protection of the law is not available when the Georgia man faces 25 years in prison under exactly the same circumstances that would earn a Kentucky man only 5 years in prison. Blockberger has been the standard for the nation in deciding where multiple punishments are permitted, but time has so distorted its meaning that it is now essential that the underlying principle be restated and

reaffirmed.

The Sixth Circuit has firmly and repeatedly rejected the application of Blockberger to an offense involving a course of conduct. The Eleventh Circuit has now applied Blockberger and declined to follow Sixth Circuit precedent. This case provides this Court with an ideal vehicle to address and resolve the clear conflict betwen the circuits on the scope of Blockberger with regard to continuing offenses.

II. THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DUE PROCESS BY FINDING THAT PETITIONER HAD FAILED TO MEET HIS BURDENS OF PROVING HE HAD CONTINUOUSLY POSSESSED ONLY ONE QUANTITY OF COCAINE AND OF PROVING THAT EACH COUNT CHARGED A QUANTITY THAT WAS CHARGED IN A DIFFERENT COUNT.

The fundamental guarantee of Due Process under the United States Constitution has been circumvented in an

arbitrary fashion by the decision below, which placed upon Petitioner the burden of going forward with evidence to prove the absence of multiple punishable offenses, particularly where the question is primarily an issue of law rather than an issue of fact. Not only is this holding a violation of due process; it is inconsistent with prior decisions of this Court as well as other circuits.

No one can be required, consistent with due process, to prove the absence of violation of law. Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973).

Two findings of the Eleventh Circuit below form the basis for this due process challenge: First, "There is no evidence to show that Vaughn has continuously possessed only one quantity of cocaine." Vaughn, 859 F.2d at 865. And, second, "No count charged an amount that was

included in the charge in a different count." Id. As a basis for this shifting of burden the Court of Appeals cited United States v. Marable, 578 F.2d 151 (5th Cir. 1978) for the following proposition:

> To support a claim of double jeopardy a defendant must show that the two offenses charged are in law and fact the same offense.

Id., at 153 (emphasis added). Marable is a conspiracy case involving multiple indictments and offers no support for the position that the burden of proof rests upon the defendant under the fact situation in the instant case. Actually, Marable was decided in favor of the defendant on a finding by the Court that the second indictment did, in fact, constitute double jeopardy.

It is well settled that in a criminal case the Government is required

to prove all of the elements of each offense charged beyond a reasonable doubt. See McCormick, Evidence, 681-685 (1954); 9 Wigmore, Evidence, #2497 (3rd Ed. 1940).

On the other hand, as the Court of Appeals in United States v. Stricklin, 591 F.2d 1112, 1117 (5th Cir. 1979) held: "It is indisputed that the burden of going forward by putting the double jeopardy claim in issue is and should be on the defendant." Stricklin was a multi-indictment case where the double jeopardy claim was raised prior to trial on the second indictment. The Stricklin Court went on to say, though, that once the defendant had come forward with a prima facie non-frivoulous claim, the Court was faced then with determining whether the defendant or the Government should carry the burdent of persuasion from that point forward. The Court went

on to state that it was adopting the Third Circuit's finding in United. States v. Mallah, 503 F.2d 971 (2nd Cir. 1974), and agreed that the burden of establishing that indictments charging separate crimes is most equitably placed on the Government when a defendant has made a non-frivolous showing that an indictment charges an offense posing double jeopardy, since the Government controls the particularity of the indictment, it should bear the responsibility for any resulting ambiguities.

Petitioner submits that Mullany v. Wilbur, 421 U.S. 684, 44 L.Ed.2d at 508, 95 S.Ct. 1881 (1975) is analogous to the instant case. As in Mullany, the due process requirement that the Government must prove beyond a reasonable doubt every fact necessary to constitute each crime charged renders invalid any rule that the defendant must prove by a

preponderence of the evidence that only one continuing possession existed. This is true notwithstanding the fact that multiple possession is not a fact necessary to prove the crime of possession with intent, but comes into play only in determining punishment after the jury has determined that the defendant is guilty since: (1) the criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability; (2) the safeguards of due process are not rendered unavailable simply because a determination may have been reached already that might lead to stigmatization and an impairment of liberty; and (3) if due process requirements were limited to those facts that constituted a crime as defined by law, the Government, simply by redefining the elements of the crime to characterize

them as factors bearing solely on the extent of punishment, could undermine may of the interest the double jeopardy clause seeks to protect without effecting any substantive change in the law. See generally Mullany, 421 U.S. at 696-97.

In placing on Petitioner the burden of proving that there was but one continuing possession, the Eleventh Circuit stated:

> There is no evidence to show that Vaughn has continuously possessed only one quantity of cocaine and no continuous possession was charged.

Vaughn, at 865.

If "no continuous possession was charged", it follows that five separate possessions were charged for the five separate dates within the time span cited for the five counts. But, each of the five counts in the indictment charged only possession of a "quantity of

cocaine". The indictment fails on its face to charge possession of different cocaine on the five dates and, in effect, does not charge different possessions in the five different counts. The Government, by failing to deny or otherwise defend against the petitioner's claim of the same cocaine in all five counts, has, in effect, conceded this issue at District Court level. It was plain error for the Eleventh Circuit to ressurect this closed issue and shift the burden once again to the defendant in affirming the district court decision.

CONCLUSION

Petitioner respectfully submits that on the basis of the foregoing argument, this Court should grant this Petition for Writ of Certiorari to review this case. The decision of the Court below creates a

clear conflict between the circuits as to the interpretation of the fundamental protection against double jeopardy. Moreover, the basis of the decision below improperly shifted the burden of proof to the defendant in a criminal case. This petition presents a substantial question which deserves to be resolved by this Court.

Respectfully submitted,

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32301
Petitioner, Pro Se

APPENDICES

Amendment V,

United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII,

United States Constitution:

> Excessive bail shal not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

21 U.S.C. §841, which provides in pertinent part:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .
>
> (b) Penalties . . .
>
> > (1)(a) In the case of a controleld substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
vs.	)	CR683-004
	)	
CHARLIE JOE VAUGHN	)	

ORDER

This defendant was convicted by a jury's verdict on August 19, 1983, and was sentenced September 22, 1983. He appealed, and his conviction was affirmed and made the judgment of this district court February 13, 1985.

On June 10, 1985, defendant Vaughn filed a motion for reduction of his sentence pursuant to Fed.R.Crim.P. 35. On August 1, 1985, the Court denied said motion.

More than a year later, on March 23, 1987, defendant Vaughn filed another motion to vacate illegal sentence pursuant

to Fed.R.Crim.P. 35(a). On July 20, 1987, the defendant filed a "Motion for Judicial Attention" wherein he forthrightly urges "this Honorable Court to correct its own past mistakes than for the Court of Appeals to have to correct them."

There is nothing illegal about Mr. Vaughn's sentence. It was appropriate to his activities and level of culpability. Defendant Vaughn is most deservedly upon the list of the dozen guiltiest men I ever tried.

Accordingly, the March 23, 1987, "motion for correction of illegal sentence" as amended or refiled is DENIED.

ORDER ENTERED at Augusta, Georgia, this 13th day of August, 1987.

/s/
DUDLEY H. BOWEN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES of America,
Plaintiff-Appellee,

v.

Charlie Joe VAUGHN,
Defendant-Appellant.

No. 87-8666

United States Court of Appeals,
Eleventh Circuit

Nov. 4, 1988

Appeal from the United States District Court for the Southern District of Georgia.

Before RONEY, Chief Judge,
TJOFLAT and EDMONDSON, Circuit Judges.

PER CURIAM:

The sole issue presented by this appeal is whether the district court properly denied appellant Charlie Joe Vaughn's Fed.R.Crim.P. 35(a) motion to correct sentence, challenging on double jeopardy grounds the imposition of separate consecutive sentences for his conviction of possession with intent to distribute cocaine on five separate

occasions. We affirm.

Vaughn was convicted of possession with intent to distribute cocaine on March 9, 1983.[1] Each time a small amount of cocaine was purchased from Vaughn or a co-defendant as part of an investigation being conducted by the Georgia Bureau of Investigation. Vaughn contends that he continually possessed only "one" quantity of cocaine, and that each event was simply a part of that one possession. Thus, he argues the five consecutive sentences are illegal and violate the prohibition against double jeopardy.

---

1. Conviction under 21 U.S.C.A. §841(a)(1) affirmed on appeal. United States v. Vaughn, 736 F.2d 665 (11th Cir. 1984). Denial of 28 U.S.C.A. §2255 motion to vacate sentence affirmed. Vaughn v. United States, 803 F.2d 1184 (11th Cir. 1986) (unpublished opinion), The district court then denied Vaughn's Rule 35(a) motion to correct an illegal sentence challenging the imposition of these consecutive sentences, from which Vaughn appeals.

A similar argument was recently rejected by this Court in United States v. Maldonado, 849 F.2d 522 (11th Cir. 1988). Whether multiple charges constitute one offense turns on whether each charge requires proof of an additional fact which the other does not. To support a claim of double jeopardy, a defendant must show that the offenses are in law and fact the same offense. Maldonado, 849 F.2d 524 (quoting Blockburger v. United States, 284 U.S> 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) and United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978).

In Maldonado, appellant was charged pursuant to 21 U.S.C.A. §841(a)(1), with possession with intent to distribute nine ounces of cocaine on October 9, 1986 in Volusia County, Florida, and with possession with intent to distribute one

pound of cocaine on the same date in Seminole County, Florida. Maldonado had been arrested in Volusia County after leaving his home to distribute the quantity of cocaine found in his car upon his arrest. A subsequent search of his home in Seminole County uncovered the cocaine charged in the second count. This Court, distinguishing United States v. Fiallo-Jacome, 784 F.2d 1064 (11th Cir. 1986), on which Vaughn relies, rejected Maldonado's argument that the consecutive sentence on each count violated double jeopardy.

Fiallo-Jacome held that a two-count indictment for violations of 21 U.S.C.A. §841(a)(1) was multiplicitous where one count charged a continuous possession of cocaine during a three-month period, and the other count charged an isolated

possesion of an amount that had been taken from that included in the amount charged in the first count. We found Maldonado to be a different case, since the two counts charged separate offenses, the Government had not charged a continuous possession, and each count required proof of a different quantity of cocaine in different counties. Unlike Fiallo-Jacome, Count I in Maldonado did not charge possession of an amount that was also included in the amount that was charged in Count II. Maldonado, 849 F.2d 524.

This case is more like Maldonado than Fiallo-Jacome. Vaughn was charged with five separate possessions of quantities of cocaine of varying purities on different dates. A forensic chemist testified as to the quality of cocaine received on certain dates: March 9-87.5% cocaine; March 23-68.8% cocaine; April

7-92% cocaine; May 2, consisting of three samples-40.4%, 50.1%, and 50.4% cocaine respectively. The chemist was not asked to determine the purity of the cocaine purchased on April 27. There is no evidence to show that Vaughn has continuously possessed only one quantity of cocaine, and no continuous possession was charged. Each count required proof of a quantity of cocaine on different dates. No count charged an amount that was included in the charge in a different count. Under these facts, there has been no violation of double jeopardy. See also United States v. Blakeney, 753 F.2d 152, 154-55 (D.C.Cir 1985) (possession of one quantity of marijuana at place of employment and different quantity at apartment held separate and distrinct offenses). Cf. United States v. Acosta, 763 F.2d 671, 689-90 (5th Cir.)

(conviction on three separate counts of possession with intent to distribute marijuana upheld against challenge that only one substantive count of possession was proved by the Government, where counts concerned different amounts of marijuana, transported on different occasions, occurring weeks or moths apart, and where jury could have inferred that on each trip a new load of marijuana was obtained), cert. denied, 474 U.S. 863, 106 S.Ct. 179, 88 L.Ed.2d 148 (1985).

To the extent that United States v. Woods, 568 F.2d 509 (6th Cir.), cert. denied, 435 U.S. 972, 98 S.Ct. 1614, 56 L.Ed.2d 64 (1978), supports Vaughn's position, we decline to follow it.

AFFIRMED.

No. 88-1433

FILED
APR 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHARLIE JOE VAUGHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's five convictions for possession of cocaine with intent to distribute it must be merged in a single sentence where each count charged possession on a specific and different date, where the purity of the cocaine petitioner sold on each of the five occasions was different, and where there was neither a charge nor evidence of a continuing possession of only one batch of cocaine.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-11) is reported at 859 F.2d 863. The order of the district court (Pet. App. 3-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1988. The petition for a writ of certiorari was not filed until ~~February 27~~, 1989, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted on five counts of possessing cocaine with intent to distribute it and one count of possessing methaqualone with

intent to distribute it, all in violation of 21 U.S.C. 841(a)(1). He was sentenced to consecutive terms of five years' imprisonment on each of the cocaine counts, five years' probation on the methaqualone count, a special parole term of 15 years, and a $55,000 fine. The court of appeals affirmed. 736 F.2d 665 (1984). In March 1987 petitioner moved for correction of his sentence under Fed. R. Crim. P. 35(a). The district court summarily denied the motion, Pet. App. 3-4, and the court of appeals affirmed, Pet. App. 5-11.

The evidence at trial, which is summarized in the government's brief on petitioner's direct appeal (Gov't C.A. Br. 2-8), showed that five times between March 9 and May 2, 1983, petitioner sold varying amounts of cocaine to the two informants and an undercover agent. The first of the five charged acts of cocaine possession occurred on March 9, when petitioner sold an informant and the undercover agent a package containing 7.1 grams of 87.5 percent pure cocaine at his home in Emanuel County, Georgia. On March 23 petitioner sold the two men another package containing 6.9 grams of 68.8 percent pure cocaine, which he delivered to an informant's place of business in Metter, the county seat of Candler County, Georgia. On April 7 petitioner returned to Metter to give the informant and agent 14.5 grams of 62 percent pure cocaine. Later that month, on April 27, petitioner sold 7.2 grams of cocaine in Emanuel County. The purity of that cocaine was never determined. Finally, on May 2 petitioner arranged to sell an informant two ounces of cocaine. Agents arrested petitioner in Stillmore, Georgia, in the midst of the negotiations and seized a bottle and two packages of cocaine from petitioner's automobile. The bottle and the packages contained between 21.1 grams and 30.3 grams of cocaine of a purity ranging from 40 percent to 50.4 percent.

Following his arrest agents searched petitioner's residence and found notebooks containing 25 to 30 pages of notations of what appeared to be drug transactions, as well as other papers containing similar records. In a car parked outside the residence, the agents found a plastic bag containing 1,001 methaqualone tablets.

ARGUMENT

1. Petitioner contends (Pet. 6-27) that he was improperly given multiple consecutive sentences for what he argues was a single continuing possession of cocaine.

Petitioner's position rests entirely on his assertion that he was "sentenced five times for the continuous possession of the same quantity of cocaine" (Pet. 13). In fact, there is no evidence that petitioner was in continuous possession of the same quantity of the drugs. To the contrary, the evidence of the varying purities of the cocaine he distributed provides a firm basis for the opposite conclusion.

The indictment in this case charged five separate acts of possession with intent to distribute cocaine—on March 9, 1983 (Count 1), on March 23, 1983 (Count 2), on April 7, 1983 (Count 3), on April 27, 1983 (Count 4), and on May 2, 1983 (Count 5). The cocaine that petitioner distributed on three of the four dates in March and April was of different purity (the cocaine that petitioner distributed on April 27 was not tested for purity), and the cocaine samples that were discovered in petitioner's automobile upon his arrest on May 2 were not of the same purity as any of the earlier quantities he sold. Thus, the evidence supported the conclusion that petitioner did not simply possess one batch of cocaine over the six-week period, but that he possessed different batches of cocaine during that period from which he sold portions to the informant and the undercover agent. Under similar circumstances, the

courts of appeals have uniformly held that it is proper to charge the separate possessions in separate counts and to subject the defendant to cumulative penalties. See, *e.g.*, *United States* v. *Rich*, 795 F.2d 680, 682-683 (8th Cir. 1986); *United States* v. *Rodriguez-Ramirez*, 777 F.2d 454, 457-458 (9th Cir. 1985); *United States* v. *Griffin*, 765 F.2d 677, 680, 682-683 (7th Cir.), cert. denied, 431 U.S. 964 (1985); *United States* v. *Acosta*, 763 F.2d 671, 689-690 (5th Cir.), cert. denied, 474 U.S. 863 (1985); *United States* v. *Blakeney*, 753 F.2d 152, 154-155 (D.C. Cir. 1985); *United States* v. *Privett*, 443 F.2d 528, 531 (9th Cir. 1971).

The cases on which petitioner relies are either distinguishable or contrary to his position. *United States* v. *Mathis*, 673 F.2d 289 (10th Cir.), cert. denied, 457 U.S. 1120 (1982), involved a single event in which the defendant gave the undercover agent one-quarter ounce of cocaine as a sample, sold approximately one-half pound later that day, and immediately after his arrest for that sale was found to be in possession of 10 grams of cocaine. The government charged one possession with intent to distribute, in light of the evidence that the three different cocaine possessions were part of a single criminal transaction, and the court agreed that the events constituted only one crime. 673 F.2d at 292. There is an obvious difference between charging as multiple offenses the distribution of a single package of cocaine, from which a sample is taken, and charging multiple possessions—in different locations and over a number of weeks—of bags of cocaine that are readily distinguishable from each other by purity. The *Mathis* case, in which the government charged only a single offense, is therefore not helpful to petitioner at all.

Similarly, *United States* v. *Palafox*, 764 F.2d 558 (9th Cir. 1985) (en banc), involved a single event. In the course of selling heroin to an undercover agent, the defendant was arrested after he gave the agent a sample of the drug.

The defendant was thereafter charged with distribution of the sample and possession of the remainder with intent to distribute it. The court of appeals held that only one offense was proved; the court explained that the defendant "should not receive multiple punishments for steps in what in fact amounted to one frustrated delivery of drugs." 764 F.2d at 563. That case obviously does not control a case such as this one, which involved transactions separated in time and place from one another. Indeed, the Ninth Circuit later observed that its decision in *Palafox* is limited to cases in which the distribution of the sample and the possession of the remainder occurred at the same time and the same place. See *United States* v. *Palacios,* 835 F.2d 230, 233-235 (9th Cir. 1987); *United States* v. *Wolf,* 813 F.2d 970, 977 (9th Cir. 1987); *United States* v. *Rodriguez-Ramirez,* 777 F.2d 454, 457-458 (9th Cir. 1985).

The prior Eleventh Circuit cases on which petitioner relies are likewise unhelpful to him. In *United States* v. *Fiallo-Jacome,* 784 F.2d 1064 (11th Cir. 1986), the indictment contained two counts charging the possession of cocaine during overlapping time periods; one count charged possession on May 17 and the other charged possession as a continuing offense from February through May. The court found that both counts seemed to charge a single offense, and the evidence showed only one continuing possession of a single quantity of cocaine. 784 F.2d at 1066-1067. Here, by contrast, the counts are not overlapping and the evidence shows multiple transactions. And *United States* v. *Maldonado,* 849 F.2d 522 (11th Cir. 1988), which petitioner cites in his support (Pet. 15), is entirely consistent with the decision below. In *Maldonado,* a two-count indictment charged the defendant with possession of cocaine on a single date but in two locations—his automobile and his residence—and the court of appeals upheld the separate convictions on those two counts. There

is no principled distinction between that case and the instant one; if anything, *Maldonado* more closely suggests a single event than petitioner's separate and repeated transactions over a number of weeks.

Finally, petitioner relies on a series of Sixth Circuit cases in support of his assertion that the circuits are in conflict on the issue he presents in his petition. But the Sixth Circuit cases on which he relies are all readily distinguishable. In *United States* v. *Woods,* 568 F.2d 509 (6th Cir.), cert. denied, 435 U.S. 972 (1978), the court of appeals vacated the defendant's three separate convictions for possessing heroin with intent to distribute it because all three packages of heroin at issue in the three counts were seized at the same time from a single location and were virtually identical in both weight and purity (568 F.2d at 510-511). That case is obviously inapplicable here, because this case involves the possession and sale of different batches of drugs, not the simultaneous possession of one quantity of drugs that happens to be packaged in several containers.

The decisions of the Sixth Circuit in *United States* v. *Jones,* 533 F.2d 1387, 1392 (1976), and *United States* v. *Reed,* 647 F.2d 678 (1981), are likewise inapposite. *Jones* held that possession of the same handgun on five different dates was a single course of conduct punishable as only one offense. The distinction between the ongoing possession of one item and the possession on different dates of five separate batches of drugs of differing quality is obvious, and is sufficient to distinguish that case from this one. *Reed* involved the simultanous possession and transportation of stolen goods. The court held that multiple convictions could not be upheld in that case based on the fact that the goods had originally been stolen from different persons. Once again, however, that case turned on the fact that the government sought to obtain multiple convictions based on conduct relating to a single quantity of

stolen goods; this case, by contrast, concerns separate transactions involving different batches of drugs.

2. Petitioner also asserts (Pet. 27-34) that the court of appeals improperly placed on him the burden of establishing a single continuous possession, rather than placing the burden on the government to show that petitioner committed multiple drug offenses. Petitioner has not accurately described the way the court of appeals disposed of his claim.

Petitioner did not raise his multiplicity claim on his direct appeal; he raised it only in his Rule 35 challenge to his sentence. It was therefore proper for the court of appeals to impose on petitioner the burden to show that he was entitled to relief from the sentence that had been imposed after trial and affirmed on direct appeal. In order to establish a right to relief, petitioner would have to demonstrate that the evidence did not support the conclusion of the court below that petitioner had in fact committed multiple drug violations. Because the evidence shows just the opposite, the court of appeals properly held that petitioner had failed to meet the burden imposed on him in a proceeding in which he sought to raise a collateral challenge to his convictions.*

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* We question whether Rule 35 even permits the type of challenge made in this case. Petitioner's real challenge is not simply to his sentence, but to his convictions. See *Ball* v. *United States*, 470 U.S. 856 (1985) (holding that it is improper to convict and concurrently sentence someone for possessing and receiving the same firearm, and that one of the convictions must be vacated). Rule 35 serves only a "narrow function" of correcting an illegal sentence and is not to be used "to reexamine errors occurring at the trial or other proceedings prior to the imposition of sentence." *Hill* v. *United States*, 368 U.S. 424, 430 (1962). But even if petitioner's pleading in the courts below had been treated as a motion for collateral relief under 28 U.S.C. 2255, the analysis of the court of appeals would have been the same, and petitioner would have fared no better.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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APRIL 1989

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